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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 771 & 93

LESTER E. BANNING,
Petitioner and Cross-Respondent,

vs.

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner.

ANSWER OF LESTER E. BANNING, PETITIONER, TO RESPONDENT'S CROSS-PETITION.

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Midwest Law Printing Co., DElaware 7-6669

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Lester E. Banning, filed his petition praying that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit, entered on April 5, 1949. Respondent, Detroit, Toledo & Ironton Railroad Company, filed its cross-petition also asking that a writ of certiorari be granted. This brief is addressed to that petition.

Petitioner, respondent and cross-petitioner all rely upon the same section of the Code to invoke jurisdiction of this Court.

The matter involved is fully set forth in the briefs of the petitioner and cross-petitioner.

Question Presented By Cross-Petitioner.

The sole question presented by the cross-petition of respondent is: "Whether there was sufficient evidence to warrant the issue of excessive speed to go to the jury".

Statement of Case:

We accept cross-petitioner's statement of the facts but for the purpose of supplying certain inefficiencies and clarifying some inaccuracies that we believe exist in cross-petitioner's statement, we supplant the same in the nature of a limited statement of facts.

A Limited Statement of Facts.

Plaintiff testified (R. 68) that from the time he took his position on the braking platform and began applying the brakes he continued to apply them up to the point of the impact; he continued a constant application of brakes during the interval. He testified (R. 34) that he performed a coupling operation when the two cars were picked up on the distillery tracks; that he had to dismount and get on the road bed; there was a thin layer of mud on it; about 2 inches deep; that he had to walk in and around those cars. Plaintiff had on new boots; (R. 53) they were muddy when he mounted the braking platform. The braking platform was made of steel, jutting out from the end of the car about 8 inches and it

was about 2 feet long running across the end of the car; that was to stand on while applying the brakes on the car (R. 46). Plaintiff was standing on the platform with his lantern in his left hand and his two hands turning the brake wheel. He was tightening the brakes to slow the cars down at the time of the accident (R. 47).

Plaintiff's lantern was admitted in evidence as plaintiff's Exhibit 3 (R. 94).

Banning had worked for cross-petitioner, Detroit, Toledo & Ironton Railroad Company as a brakeman from July 19, 1945, (R. 21) to September 23, 1946, when injured; seven days per week except a day off now and then (R. 22). He was 32 years of age and his expectancy was 33.21 years (R. 68); married and has a boy 10 years old and a girl 10 months old (R. 21). Banning, on being interrogated by the Court (without objection by defendant railroad company) testified: (R. 96) he had both hands on the brake wheel with the lantern in his left hand gripping the wheel, (R. 96) at the time of the contact between the car he was on and the rest of the train, with his feet firmly on the brake platform. That he had been in that situation before at similar work; that there was no difference in being in this situation at this time and in a similar situation at other times with reference to stance or grip.

The Court (R. 96):

> "What difference was there with reference to the contact, if any? You understand what I mean by 'contact'. Your car going together with another car."

Answer:

> "Yes sir. There was a great contact. They came together with a greater force than I ever experienced on before. I had been in a similar operation and situation 15—20 times before when we made drops

of that sort; after the contact my hands and feet were jerked loose, I knew I was falling but there was nothing to grab there after I was jerked loose."

And at (R. 97) plaintiff testified that there was about three feet separating the car he was riding and the gondola; that he travelled through the air after the contact around seven feet from the brake platform to where he fell on the gondola; that it was about 11 feet from the braking platform to the ground (R. 97, 98); that he bounced off the gondola car and landed on his back on the ground on the end of railroad ties that protruded an inch or two above the ground level (R. 63).

Carl F. Ruetz, the engineer in charge of the train (a witness called by defendant) testified on cross examination (R. 258): it wasn't necessary to recouple those two cars that had been switched in; they were coupled.

While engineer Ruetz, was testifying, on direct examination, the following occurred (R. 254):

Q. What did you see when you came up there?

A. Mr. Banning was lying on the ground.

Q. Did you hear him say anything? A. I asked him what happened.

Q. What did he say? A. He said,—I didn't ask him just what happened in that way, I says, "What happened, did you get knocked off?" He says, "No, I slipped and fell."

On cross examination witness Ruetz (R. 262) testified:

Q. You had a good reason to ask him if he had been knocked off, didn't you? A. Yes.

Defendant's witness, Ruetz, further testified that he saw Banning's lantern fall (R. 252). "Well, when I seen the lantern fall, I would approximately say it was eight feet in the air when I seen it going towards the ground,"

• • • "• • • and then, oh, I would say approximately a few seconds after I seen the lantern go to the ground I seen the lantern move back and forth on the ground for me to stop." (R. 253) "I said to the conductor there was something wrong." "I went where he was lying on the ground." It was then that engineer Ruetz asked the question "Did you get knocked off?"

Witness Toombs.

N. I. Toombs, conductor for defendant railroad company (called by defendant) testified: We picked up 8 or 9 cars at the stone quarry; some were loaded. I think they were all gondolas, and shoved them on the main line (R. 211). We left them about 4 cars North of Harrison Avenue (R. 213). It had been raining all the afternoon and was raining at the time of Banning's accident to a lesser degree (R. 222). The two cars involved in the flying switch were loads (R. 224). Each empty car would weigh about 20 tons and loaded from 60 to 70 tons (R. 225). Cars on the main line were about 175 feet North of Harrison Avenue (R. 230). The total height of a box car is 15 feet (R. 231). I saw Banning's lantern fall 10 feet to the ground (R. 232); when I saw the light fall and saw a stop signal from the ground I went to Mr. Banning; he was lying with his feet at an angle of about 45° from the rail; his feet were about 3-4 feet from the rail (R. 233).

Witness Smalley.

Harold Dean Smalley, brakeman for the defendant railroad company (called by defendant) testified: The duty I was to perform in connection with the flying switch was flagging Harrison Avenue crossing. I was standing in the middle of Harrison Avenue (R. 238). On direct

examination, in answer to the question "do you recall seeing them (the two cars) as they passed you on Harrison Avenue?" "I recall just a little bit of them as I was looking both ways on Harrison Avenue. My duty there was with reference to the traffic" and to the question "Do you know how fast a man walks on the average?", Answer: "3-4 miles an hour". In his opinion they travelled about 3-4 miles an hour and he heard no sound when the cars coupled with the string on the main line (R. 239). That he went over to see Banning after the accident. He was down by the cars where they coupled. He was sitting there on the ground. He was moved and sat on a grain scoop (R. 240).

Williard E. Hitchington.

Williard E. Hitchington, fireman, (called on behalf of defendant) testified (R. 263):

He was on the engine at the time the drop switch was made; the switch engine was proceeding, before the accident southward along the main line pushing 2 box cars and drawing up to a certain point from 8 other cars, mostly gondolas; we left the gondolas on the main line with brakes set (R. 264); and we proceeded to make the drop. We got the 2 cars going about 12 miles per hour and then the engineer gave the slack so the man could cut the cars off and the engine ran into the distillery track and the cars went down the main line track (R. 265). I went to where Banning was lying. He was about 5 feet from the track on his back; Mr. Smalley and I picked him up. He was in pain and sat on a grain scoop.

ARGUMENT.

The Evidence of Excessive Speed and the Violent Collision Was Sufficient to Take the Case to the Jury.

We submit that the trial court in his memorandum of grounds for denial of motion for new trial (R. 385-388) clearly stated the rule of law governing the case, and we quote:

> "The case was submitted to the jury on the issues of defendant's negligence in failing to furnish plaintiff with a reasonably safe place to work, the excessive speed at which the two cars were dropped by the engine, and the plaintiff's contributory negligence in failing to remove the mud from his shoes before the switching operation during which the accident occurred.
>
> Defendant claims that there is a lack of evidence of any negligence on its part which was the proximate cause of the accident; that the operation of dropping the two cars was an ordinary maneuver. The plaintiff testified, however, that the speed of the two dropped cars was much greater than any similar operation which he had theretofore experienced; that it was in fact between six and seven miles an hour. (*At the time of the collision* (R. 58) the italics are ours). Plaintiff theretofore had ample opportunity to acquaint himself with the speed of moving vehicles, both as a driver of an automobile and as having been engaged previously in similar switching operations. It is my opinion that such speed alone, if plaintiff's testimony be believed, is of itself, sufficient to make it a question for the jury's consideration, notwithstanding the testimony of some of defendant's witnesses that the speed was between three and four miles an hour. When the speed of six or seven miles an hour is taken together with the weather conditions prevail-

ing, such as a misting rain, plaintiff's muddy shoes from working on muddy ground, the small braking platform on which plaintiff had to brace himself in his operation of braking the speed of the cars, a wet braking platform, not necessarily because of plaintiff's muddy shoes but because of the rain, and the insufficient opportunity to slow the speed of the rolling cars in the distance they traveled—all these elements are peculiarly questions for the jury."

In *Bailey* v. *Central Vermont Railway,* 319 U. S. 350, the Court said (p. 354):

> "The right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence.' *Jacoby* v. *New York City,* 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern system of workmen's compensation. But however inefficient and backward it may be it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In a similar situation *Norfolk & Western Railway Co.* v. *Fraley,* C.C.A. 6th 69 F. 2d 775, the testimony was that when the cars were uncoupled from the engine they were moving about as fast as one could walk and upgrade, but after the brakes were set the speed may have been a little reduced and that the cars were moving four or five miles an hour and stopped "awful quick", there the Court said: "This appears quite sufficient if believed to show a

very abrupt and an extraordinary jerk of the car on which Fraley stood".

The Supreme Court also said, in a late case: "And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury". *Ellis* v. *Union Pacific Railway Co.*, 329 U. S. 649, 653.

An interesting case involving the speed of shunted cars is *Terminal Railway Association of St. Louis* v. *Schorb*, C.C.A., 151 F. 2d 361, where it was said (p. 364):

> "Defendant, however, had the duty, imposed or preserved by the Federal Employers' Liability Act, to answer to plaintiff for negligence of defendant's employees. This duty existed regardless of the reason its employees might assign for limiting speed of cars in a switching operation. Whatever may have been the reason for the custom of limiting speed of cars on making a flying switch, defendant could not with impunity shift the cars at any rate of speed desired in disregard of life and limb of its employees. If the speed of the shunted cars was so excessive as to constitute negligence, and the excessive speed was the proximate cause of the injury, plaintiff is entitled to recover. The test of defendant's negligence was not custom or usage, but what reasonable prudence would require under the circumstances. *Dunagan* v. *Appalachian Power Co.*, 4th Circuit, 33 F. 2d 876, 68 A. L. R. 1393."

In a very recent case, *Henwood* v. *Coburn*, 165 F. 2d 418,423, the Eighth Circuit Court of Appeals said:

> "• • • there is to be borne in mind also the apparent emphasis in the recent decisions of the Supreme Court that questions of negligence and proximate cause under the Federal Employers' Liability Act are generally for the jury; that the field of jury inference is a broad one and only requires a rational

possibility on the facts; and that a verdict is not necessarily one of speculation and conjecture because inferences are arrived at by the application of general experience and common reaction to the evidentiary situation. (Cases cited.) And also, as previously suggested, if an employer's negligence is in any part the efficient cause of an employee's injury, the employer is liable under the Act. (*Fleming* v. *Husted*, 8 Cir., 164 F. 2d 65, 67, 68, 'It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act.' *Grand Trunk Western R. Co.* v. *Lindsay*, 233 U. S. 42, 47, 34 S. Ct. 581, 582, 58 L. Ed. 838, Ann. Cas. 1914C, 168, approving a trial court's instruction."

"In the Court's opinion, there was substantial evidence on which the jury's verdict could be based. Plaintiff's testimony is not unbelievable. The fact that reasonable men might differ as to result makes it all the more a question for the jury."

The United States Court of Appeals for the Sixth Circuit, in the case at bar, said (R. 409):

"Whether the collision contact was the result of excessive speed or caused by Banning's failure to properly use the braking mechanism presented a disputed question of fact. The District Judge was correct in submitting this issue to the jury." Citing: *Bailey* v. *Central Vermont Railway Co.*, 319 U. S. 350; *Lavender* v. *Kurn* 327 U. S. 645; *Ellis* v. *Union* P. R. Co., 329 U. S. 649; *Norfolk & W. Ry.* v. *Fraley*, 69 Fed. (2) 775, C. A. 6."

The following are the undisputed facts:

That while the "flying switch" or "drop switch" was being made at the time the engine was uncoupled from the two cars so that it could run into the distillery track and allow the two cars to follow down the main track on their momentum, the two cars were going at the rate of at least 11 miles an hour.

Petitioner's testimony (page 3 of this brief) is corroborated by the testimony of fireman Hitchington (page 6 of this brief) and is questioned only by flagman Smalley who stated he saw a little of the cars (pages 5-6 of this brief). He was watching the traffic on Harrison Avenue both ways. This fact was not disputed by the engineer or conductor.

Plaintiff's testimony that there was a terrific collision when the car he was riding contacted the standing cars is not disputed. Only flagman Smalley testified that he did not hear a collision.

That the cars upon which plaintiff was riding came in contact with the standing cars on the main line when going at a speed of six to seven miles an hour. This testimony was controverted, but only indirectly, by the testimony of flagman Smalley.

That the two cars upon which plaintiff was riding weighed 120-140 tons and came in contact with at least eight cars loaded with gravel with brakes set, weighing at least 520 tons.

That the two cars upon which petitioner was riding contacted the eight standing cars and made an automatic coupling.

That from the time petitioner was able to reach the braking platform and adjust the cam after uncoupling the engine and climbing up the ladder of the car to the braking platform he was at Harrison Avenue the cars were moving at about 11 miles an hour when the south end of the standing cars on the main line was but 200 feet distant; the main track was level over that distance.

That he had walked in two inches of slushy slippery mud along the back track and that there was mud on his boots at the time he mounted the brake platform.

That the brake platform projected eight inches out from the car and was two feet long and made of metal and was wet.

That when the collision occurred plaintiff was propelled from the platform through the air three feet outward and four feet downward and landed on the end of a gondola loaded with gravel and bounced from there approximately eight feet downward and three-five feet outward landing on the right-of-way with his feet toward the track and three-five feet distant therefrom.

That he suffered a compression fracture of four of his vertebrae.

That plaintiff's "Exhibit 3" (the lantern carried by petitioner at the time of his injury), is constructed with a strong metal cage surrounding the lamp; the bottom of this cage is circular and constructed of a heavy wire-like metal of such tensile strength that it cannot be pulled back in shape by the force and strength of one's hands. (In the event this cause is transferred to the summary calendar, we will ask that the exhibit be forwarded for this Court's examination.)

The condition of the lantern is mute and unescapable evidence of the existence of terrific force and violence. It corroborates plaintiff in his statement that the cars came together with terrific impact. In its opinion reversing the District Court, the Court of Appeals (R. 409) stated:

> "Whether the crash contact was a result of excessive speed or caused by Banning's failure to properly use the braking mechanism presented a disputed question of fact. The District Judge was correct in submitting this issue to the jury." (Citing cases.)

In this opinion the Court of Appeals said, in substance, that had the plaintiff charged in his complaint that the defendant failed to furnish him a safe place in which to work, IN THIS RESPECT: first, that he was directed and required to work under muddy conditions, and, second, that the defendant dropped the car at an excessive speed, instead of as stated by the District Judge, "defendant failed to furnish plaintiff a safe place in which to work, IN TWO RESPECTS; first, that he was directed to work under muddy conditions and, second, that the car was dropped at an excessive speed," then the plaintiff could have recovered and the Court would not have reversed the judgment. In other words, the Court of Appeals saw fit to reverse the judgment herein because of the use of the words IN TWO RESPECTS instead of the words IN THIS RESPECT.

The Court of Appeals reversed this judgment on the turn of, actually, one word: for the use of the word "two" instead of the use of the word "this". In reaching this conclusion the Court of Appeals necessarily had to wholly disregard the fact that plaintiff was compelled to work in thin, slushy and slippery mud on the back track; that it was a wet night; that the braking platform was small and wet and that plaintiff's boots were covered with mud at the time he mounted the braking platform. This evidence was wholly undisputed, and in disregard of the fact that along the main track the right-of-way was paved with gravel and cinders and was not muddy; further, there was no explanation by defendant why the right-of-way and pathway to be used by petitioner on the back track could not have been in a condition comparable to the right-of-way and pathway along the main track.

In view of the evidence there was ample grounds for the jury to reasonably infer that the slippery mud on petitioner's boots could have contributed to petitioner's dislodgement from the braking platform and his injury.

Jury's verdict was not excessive.

In its conclusion on page 25 of its brief in support of its cross petition for certiorari, cross petitioner vagrantly raises the question of the excessiveness of the verdict. The evidence in regard to plaintiff's injuries shows that he was 32 years of age, had a life expectancy of something over 33 years, and it was stipulated that he earned during the year previous to the accident $3550.00 (R. 166).

The evidence showed that there was a compression fracture of the twelfth, eleventh and eighth dorsal vertebrae, with a narrowing of the inter-vertebral space between the tenth and eleventh dorsal vertebrae; a destruction of the inter-vertebral disc between the tenth and eleventh, the eleventh and twelfth vertebrae, and between the 1st and 12th dorsal at which point the intervertebral disc was protruding into the spinal canal, obstructing about fifty per cent of the canal. (These conditions can be seen by plaintiff's exhibits 1 to 26, which, if the opportunity permits, we will present to this court for its examination.) Dr. Arthur H. Conley, whose qualifications are set out on page 135 of the record, testified (R. 145) that in his opinion the condition would become progressively worse and that the outcome of corrective operations was uncertain. The doctor's testimony in this respect was corroborated by the testimony of Dr. Charles K. Barnes (R. 107) who testified (R. 109) petitioner's condition had gotten worse since the time he first saw him. "That there is more wedging than there was previously * * *." Dr. Barnes examined petitioner's

X-rays taken on the 2nd day of December, 1946 and his X-rays taken on the 12th day of September, 1947 (R. 108).

We submit that the question of the amount of damages was for the jury. We are of the opinion that this question is not in the case but in the event the Court feels differently, we ask that the Court consider the cases of *Texas & Pacific Ry. Co.* v. *Behymer,* 189 U. S. 468-469; *New York, Lake Erie & Western R. R.* v. *Winter,* 143 U. S. 60, 75; *Lincoln* v. *Power,* 151 U. S. 436; *Scott* v. *Baltimore & O. Ry. Co.,* C.C.A., 3rd Circuit, 1945, 151 F. 2d 61, 64.

The verdict certainly was not excessive, in fact, in the light of the proof, the gravity of the injuries and the present value of the dollar, it was surprisingly small.

Conclusion.

We respectfully submit that under the evidence and rules of law heretofore pronounced by this Court the question of cross-petitioner's negligence and petitioner's contributory negligence, if any, was properly submitted to the jury; that the verdict of the jury was amply supported by the evidence as was the judgment of the District Court and that said judgment should be affirmed.

For the reasons above set forth petitioner respectfully submits that the cross-petition of Detroit, Toledo & Ironton Railway Company for a writ of certiorari should be denied.

Respectfully submitted,

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